



No. 82-5789

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

ROBYN LeROY PARKS,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a trial court instruct the jury on a lesser offense where the corpus delecti of the lesser crime has not been proven independent of the Defendant's statement?
2. Does an instruction which precludes the jury from considering sympathy, sentiment, passion or prejudice or any other arbitrary factor limit the jury's consideration of relevant mitigating circumstances?
3. Did the jury instructions as a whole allow the jury to consider a non-statutory aggravating circumstance in determining the Petitioner's sentence?
4. Was the sole aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution a sufficient basis for the death sentence in the present case?
5. Has the Oklahoma Court of Criminal Appeals interpreted their capital punishment statute in a manner which creates an unconstitutional mandatory imposition of the death penalty and does such an interpretation unconstitutionally shift the burden of proof to the Petitioner to prove that a life sentence should be imposed?

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IN THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF OKLAHOMA, )  
Respondent. )

RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Court of Criminal Appeals entered on August 26, 1982, and to which rehearing was denied on September 28, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported in Parks v. State, 651 P.2d 686 (Okla.Cr. 1982).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on August 26, 1982. A petition for rehearing was denied on September 28, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The United States Constitution, Amendment VIII, provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. The United States Constitution, Amendment XIV, provides in pertinent portion:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

3. Title 21 O.S. Supp. 1976, § 701.7, (codified as 21 O.S. 1981, § 701.7), provides:

"Murder in the First Degree"

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

4. Title 21 O.S. Supp. 1976, § 701.8 (codified as 21 O.S. 1981, § 701.8), provides in pertinent portion:

"Murder in the Second Degree"

"Homicide is murder in the second degree in the following cases:

" . . . .

"(2) When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection 8, of this act." [Title 21 O.S. 1981, § 701.7]

5. Title 21 O.S. Supp. 1976, § 701.9 (codified as 21 O.S. 1981, § 701.9), provides:

"Punishment for Murder"

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

"B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life."

6. Title 21 O.S. Supp. 1976, § 701.10 (codified as 21 O.S. 1981, § 701.10), provides:

"Sentencing proceeding - Murder in the first degree."

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practical without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted

before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

7. Title 21 O.S. Supp. 1976, § 701.11 (codified as 21 O.S. 1981, § 701.11), provides:

"Instructions - Jury findings of aggravating circumstances.

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing signed by the foreman of the jury the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

8. Title 21 O.S. Supp. 1976, § 701.12 (codified as 21 O.S. 1981, § 701.12), provides in pertinent portion:

"Aggravating Circumstances

"Aggravating circumstances shall be:

" . . . .

"(4) The murder was especially heinous, atrocious, or cruel;

"(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

" . . . .

"(7) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

9. Title 21 O.S. Supp. 1976, § 701.13 (codified as 21 O.S. 1981, § 701.13), provides:

"Death penalty--Review of sentence.

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentence, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal error enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Title 22 O.S. 1971, § 861 (codified as 21 O.S. 1981, § 861),

provides:

"Formal exceptions to rulings or orders of the court in criminal proceedings shall not be necessary but for all purposes for which an exception has heretofore been necessary at the trial of a cause it shall be sufficient that a party, at the time the ruling or order of the court has been made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court with his general grounds therefor."

10. Title 21 O.S. 1971, § 1550.22(a) (codified as 21 O.S. 1981, § 1550.22(a)), provides:

"Taking credit or debit card --Receiving a taken credit or debit card.

"A person who takes a credit card or debit card from the person, possession, custody or control of another without the cardholder's consent, or who, with knowledge that it has been so taken, receives the credit card or debit card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder, is guilty of card theft and is subject to the penalties set forth in Section 1550.33(a) of this title."

#### STATEMENT OF THE CASE

The Petitioner was charged by information for the crime of Murder in the First Degree in violation of 21 O.S. 1981, § 701.7, for the murder of Abdullah Ibrahim in Oklahoma.

The evidence at trial showed that in the early morning hours of August 17, 1977, between 12:00 and 4:00 a.m., the Defendant drove into the Gulf Self-Service located at I-35 and N.E. 36th Street in Oklahoma City (Tr. 197; Court I). The Defendant filled his gas tank and Abdullah, the attendant, exited the small brick glass building and looked at the Defendant's tag number. Abdullah Ibrahim returned to the building and, on a blank credit card slip, wrote the Defendant's tag number, "XZ-5710" (Tr. 203).

Subsequently, the Defendant approached him at the payment window. Abdullah was standing up, not moving toward the alarm, when the Defendant shot Abdullah in the chest with his Winchester Western .45 caliber gun (Court I 2). The Defendant did not take any money from the station and subsequent to the shooting, the Defendant drove away (Tr. 235).

At approximately 4:35 a.m., on August 17, 1977, Thomas Heaton pulled into this self-service gas station to buy some cigarettes (Tr. 213). He walked up to the glass door and observed Abdullah

lying on the floor in some blood (Tr. 214). Mr. Heaton also observed another man in the filling station trying to fill his tank up without avail (Tr. 214). Mr. Heaton called this person over and they decided to call the police (Tr. 214). Neither one of these men entered the booth; however, they did look through the window and they observed a credit card slip (Tr. 215). They waited for the police to arrive and they gave the police a statement (Tr. 215).

Officer Riggs and Officer Doherty arrived on the scene and they also observed the victim on the floor (Tr. 199, 221). They observed a blank credit card slip, which had a pen lying across it and which contained the written tag number "XZ-5710" (Tr. 203, 224). However, this credit card slip with the tag number was not readily observable from the outside of this booth (Tr. 252). Officer Doherty also observed that the victim's keys to his residence and the station were still in the unlocked door to this booth (Tr. 211).

Officer Lord investigated this tag number and determined from a source that the owner or driver of this vehicle was Robyn LeRoy Parks, the Defendant (Tr. 227, 255). Officer Lord received information from an informant, Ms. Hill, who told officers that the defendant was involved in this murder (Tr. 239). Ms. Hill also told the officers that she had seen a large cowboy gun tucked into the Defendant's pants prior to the shooting (Tr. 252). Ms. Hill also told Officer Lord that the Defendant might be at 1408 N.E. 34th Street, where he had been residing with James R. Clegg, Jr. (Tr. 322).

Officer Charles Douglas observed a blue Continental containing one person and the tag number "XZ-5710" on N.E. 44th and Eastern (Tr. 258). Officer Douglas caught up with this vehicle in the 1600 block of N.E. 47th Street (Tr. 158). He observed a black male enter a residence, but he was unable to apprehend this person (Tr. 259). Subsequently, this vehicle was impounded (Tr. 259).

Officer Johnson inventoried this vehicle and found a prescription bottle containing the Defendant's name (Tr. 269) and a belt containing the initials "R. L. P." (Tr. 269). Also, a latent fingerprint was lifted from the trunk area of this vehicle which was determined to definitely be the Defendant's fingerprint by

fifteen points of identification (Tr. 281). Also, eight .45 caliber Winchester Western bullets were found in this vehicle (Tr. 424).

Officer Lord, on August 19, 1977, went to 1408 N.E. 34th in search of the Defendant. The Defendant wasn't at this location, so Lord talked to Mr. Clegg. He told Mr. Clegg about the \$5,000.00 reward offered by Gulf for information concerning this murder (Tr. 322).

Subsequently, Mr. Clegg voluntarily, without coercion, consented to calling the Defendant, who was in California, and he also consented to the conversation being taped (Tr. 327). At 1:29 p.m. on August 29, 1977, Officer Lord dialed 213-830-0487, which was in San Pedro, California, and Mr. Clegg talked to the Defendant (whom he recognized by voice) for 13 minutes (Tr. 309, 318, 333, 335, 339). During this phone call, the Defendant implicated himself in this murder of Abdullah Ibrahim (Tr. 310A). The Defendant admitted shooting Abiullah to avoid detection by the police for using a "hot" credit card and because he had dynamite and guns in his trunk (Court I).

On August 30, 1977, Mr. Clegg made another phone call to the Defendant from the District Attorney's office with Officer Lord present (Tr. 317). Again, 213-830-0487 was dialed and again the Defendant answered (Tr. 318, 319, 408). This conversation also was taped with the consent of Mr. Clegg. During this conversation, the Defendant told Mr. Clegg where he hid the murder weapon (Court II). After this conversation, the officers went to the described location and found a .45 caliber gun which contained five live rounds and which was in a holster made from a jockey strap (Tr. 409). They also found a box of ammunition containing 43 rounds of .45 caliber lead-nosed bullets (Tr. 410).

Thomas Jordan, the OSBI Toolmark and Firearm Examiner, could not positively identify the projectile that killed Abdullah as a projectile that had been fired by the .45 the officers found in the bushes because the bullet that killed this victim was deformed from hitting something (Tr. 436). However, he did specify that the .45 caliber bullet which caused Abdullah's death was the same brand and make as the 43 rounds found in the bushes by the police (Tr. 361, 432).

The Defendant, who was in California, was arrested by Deputy Sheriff Kemp and Deputy Sheriff Rose of the Los Angeles County Sheriff's Office. At the time of his arrest, the Defendant told the officers that he was Roger Wayne White and he showed the officers an identification card which contained the same name (Tr. 444). The State rested its case.

The defense then presented the Defendant in his own behalf. The Defendant testified on direct examination that he had previous problems with the law, including a conviction for Robbery by Force and Fear and a conviction for Attempted Burglary in the Second Degree (Tr. 466-468). Further, his defense was an alibi defense. He stated that he stayed with Elaine Sheets on August 16 and 17 (Tr. 489). Then he went to Kansas City to buy marijuana without avail and from Kansas City, he went to California on August 18, 1977, to buy marijuana (Tr. 500-502). He admitted owning a blue Continental, talking to Mr. Clegg on the phone, and the conversation with Mr. Clegg on the tape. He further stated that he was lying to Mr. Clegg on the phone so that the police would let his girlfriend and cousin out of jail and for the protection of and concern for his family (Tr. 475-478). He also stated that his tag number was written down at the Gulf Station because one time he bought gas but had no money, so the attendant wrote down his tag number (Tr. 482). He further stated that he disposed of the gun prior to August 17, 1977, because it didn't work properly (Tr. 515).

Elaine Sheets testified on behalf of the Defendant. She stated that the Defendant stayed all night August 16, 1977, until 7:00 a.m., on August 17, 1977, when he drove her to work in his blue Continental (Tr. 529). The defense then rested.

The trial court refused the Defendant's requested instruction on Murder in the Second Degree because there was insufficient evidence of the use of a bogus credit card and in the second stage of trial the Defendant stated that the instructions were acceptable and he did not object to any of the trial court's instructions (Tr. 543, 659). The jury deliberated and returned a guilty verdict for Murder in the First Degree against the Defendant.

In the second stage of trial, the jury was presented with the aggravating circumstances: (1) the murder was especially heinous,

atrocious or cruel; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence or probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found that the only aggravating circumstance was that the murder was committed for the purpose of avoiding or preventing an arrest. The jury also determined that this aggravating circumstance outweighed any and all of the mitigating circumstances and that the Defendant should be sentenced to death. According to the jury's verdict, the trial court sentenced the Defendant to death by lethal injection.

On appeal, the Oklahoma Court of Criminal Appeals held that as a matter of law the evidence was insufficient to establish that the Defendant used a fraudulent credit card in violation of 21 O.S. 1981, § 701.8(2), Murder in the Second Degree, because the Defendant's statement alone could not prove the corpus delecti of the underlying felony and, therefore, Beck v. Alabama, 447 U.S. 625 (1980), was inapplicable. The court further held the jury's Instruction No. 9, "You must avoid any influence or sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence," when considered in proper context did not nullify the court's instruction concerning mitigation. Instruction 9 was also held proper in view of Lockett v. Ohio, 438 U.S. 586 (1978), which authorized the jury to consider all evidence presented throughout the trial to determine the Defendant's sentence. The Oklahoma Court of Criminal Appeals further held that the aggravating circumstance that the murder was committed for the purpose of "avoiding or preventing a lawful arrest or prosecution" was sufficiently established because the Petitioner's taped phone conversation with Clegg clearly established the Defendant's state of mind. Lastly, the Court of Criminal Appeals held that 21 O.S. 1981, § 701.11, did not unconstitutionally shift the burden of proof to the Petitioner to prove sufficient mitigating circumstances, in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975), and that the jury was not required to recommend the death penalty even if the jury determined that more than one of the aggravating circumstances existed beyond a reasonable doubt.

These issues decided by the Court of Criminal Appeals are now questioned by the Petitioner in this Petition for Writ of Certiorari to this Court.

#### SUMMARY OF ARGUMENT

The Oklahoma Court of Criminal Appeals did not circumvent the constitutional mandate, for a lesser instruction when supported by the evidence, created in Beck v. Alabama, 447 U.S. 625 (1980), because in this case, the evidence did not warrant a lesser instruction on Murder in the Second Degree because the only evidence of this lesser crime was the Petitioner's own recorded conversation which he refuted at trial. No evidence was presented at trial to corroborate the Defendant's statement; therefore, all the elements of the lesser crime were not established and the lesser instruction was not warranted.

Instruction 9, a general instruction, which instructed the jury to "avoid and influence of sympathy, sentiment, passion, prejudice or other arbitrary factor" and which the defendant failed to object to at trial, did not limit the jury's consideration of relevant mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 585 (1978), in light of the other instructions given in the second stage of trial. Moreover, the considerations such as sympathy, prejudice and other arbitrary factors could lead to arbitrarily, wantonly and freakishly-imposed death penalties such as those criticized in Furman v. Georgia, 408 U.S. 238 (1972).

Instruction 9, which was unobjectionable at trial and which allowed the jury to consider, in determining the sentence, all the facts and circumstances of the case whether presented by the State or the Petitioner, did not allow the jury to consider a non-statutory aggravating circumstance in determining the Petitioner's sentence, in light of Instruction 4, which instructed the jury to only consider the statutory aggravating circumstances set out in the instructions and in light of this Court's mandate in Lockett v. Ohio, supra, which authorized the sentencer to consider not only the Petitioner's record and character, but any circumstances of the offense.

The aggravating circumstance that the murder was committed for the purpose of avoiding an arrest or prosecution was sufficiently established beyond a reasonable doubt, although the same circumstances did not establish the use of a bogus credit card. This sole aggravating circumstance, which outweighed the mitigating circumstances, was a sufficient finding under Oklahoma Statutes for imposing a sentence of death in the present case. For these reasons, the Oklahoma Court did not rubber-stamp this aggravating circumstance and other alleged rubber-stamped aggravating circumstances are not pertinent or relevant to the present case.

Lastly, the Oklahoma Court of Criminal Appeals has not interpreted 21 O.S. 1981, § 701.11, in a manner which creates an unconstitutional mandatory imposition of the death penalty once aggravating circumstances outweigh mitigating circumstances and the burden of proof of the mitigating circumstances was not constitutionally shifted to the Petitioner in light of the mandate in Lockett v. Ohio, that the jury must consider the character and record of the petitioner and any circumstances of the offense that the petitioner proffers, and in light of the fact that the jury was instructed to consider such mitigating circumstances even if the Petitioner failed to testify or failed to produce specific evidence in mitigation.

For these stated reasons, the Respondent respectfully submits that the Petitioner's Writ of Certiorari should be denied.

#### REASONS FOR DENYING THE WRIT OF CERTIORARI

##### I.

A LESSOR OFFENSE INSTRUCTION IS NOT CONSTITUTIONALLY REQUIRED WHERE THE EVIDENCE DOES NOT SUPPORT SUCH A FINDING.

The Petitioner asserts that the Oklahoma Court of Criminal Appeals attempted to circumvent the constitutional mandate created by this Court in Beck v. Alabama, 447 U.S. 625 (1980), by holding that there was insufficient evidence of the corpus delecti of Murder in the Second Degree, 21 O.S. 1981, § 701.3(2), independent of the statement of the Petitioner to warrant an instruction as requested by the petitioner.

In Beck v. Alabama, supra, this Court held that a Defendant was entitled to have an instruction given to the jury where the evidence warranted it. In the present case, the evidence did not warrant such an instruction because the only evidence offered to the jury to support the crime of using a fraudulent credit card, 21 O.S. 1981, § 1550.22, was the Petitioner's own recorded statement with informant, Clegg, which the Petitioner at trial stated was false. No other evidence was presented to prove the use of a bogus credit card.

In Opper v. United States, 348 U.S. 84 (1974), this Court stated, "The facts of the admission plus the corroborating evidence must establish all elements of the crime." In the present case, there was an admission, but no corroborating evidence which established all the elements of the crime of Murder in the Second Degree. Therefore, the corpus selecti of this crime was not sufficiently proven beyond a reasonable doubt, and for this reason, evidence did not warrant the requested instruction. Thus, the Court of Criminal Appeals did not circumvent the constitutional mandate in Beck v. Alabama, supra, and the Petitioner's writ should be denied.

## II

INSTRUCTION 9, A GENERAL INSTRUCTION, WHICH INSTRUCTED THE JURY TO "AVOID ANY INFLUENCE OF SYMPATHY, SENTIMENT, PASSION, PREJUDICE OR OTHER ARBITRARY FACTOR WHEN IMPOSING SENTENCE" AND WHICH THE DEFENDANT FAILED TO OBJECT TO AT TRIAL, DID NOT IMPROPERLY LIMIT CONSIDERATION OF THE MITIGATING CIRCUMSTANCES.

The Petitioner asserts that this Court should grant certiorari because Instruction 9<sup>1</sup> limited the Mitigating Circumstances

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<sup>1</sup> "You have already elected a Foreman. Your verdict must be unanimous. Proper forms of verdict will be furnished you from which you shall choose one to express your decision. When you have reached a verdict, all of you in a body must return it into open Court.

"The law provides that you should now listen to and consider the further argument of counsel.

"In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the State or the defendant and whether presented in the first proceeding or this sentencing proceeding.

provided in Instruction 6<sup>2</sup> in the present case.

The State would first submit that the Petitioner at trial stated that he found all the second stage instructions acceptable and he failed to object to Instruction 9 (Tr. 659). The State submits that the Petitioner waived any constitutional claims by failing to present them to the Oklahoma trial court. See Wainwright v. Sykes, 433 U.S. 72 (1977); 22 O.S. 1981, § 861.

Alternatively, the Court of Criminal Appeals determined that the general Instruction 9, when read in context, did not limit the consideration of the mitigating circumstances. Generally, whether a particular instruction submitted to the jury gives rise to reversible error, the court is required to view the instruction as part of a totality of the entire instructions given.

" . . . [w]e accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct. 395, 33 L.Ed.2d 368 (1973).

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"All of the previous instructions given you in the first part of this trial apply where applicable and must be considered along with these additional instructions; together they contain all the law of any kind to be applied by you in this case, and the rules by which you are to weigh the evidence and determine the facts in issue. You must consider them all together, and not a part of them to the exclusion of the rest.

"You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, consciously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

"The Court has made rulings during the sentencing stage of this trial. In doing so, the Court has not expressed nor intimated in any way the conclusions to be reached by you in this case. The Court specifically has not expressed any opinion as to whether or not any statutory aggravating circumstances exist, or whether or not any mitigating circumstances exist.

"You must not use any method of chance in arriving at a verdict but must base it on the judgment of each juror concurring therein." (O.R. 38). (Emphasis added)

<sup>2</sup> Instruction 6 in pertinent part provided: " . . . You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case.

The present instructions, which included an instruction for the jury to avoid sympathy, prejudice and arbitrary factors, considered as a whole did not restrict the mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978), which held that the sentencer cannot be precluded from the consideration of "any aspect of a defendant's character or record and any circumstances of the offense." The clear implication of Lockett is that the mitigating circumstances must be something which concerns either the defendant's character, record or the crime itself. To assert that the jury should be allowed to consider "sympathy" is to risk violation of the standards enunciated in Furman v. Georgia, 408 U.S. 233 (1972). To allow juries to consider "sympathy" in determining who shall live and who shall die is to introduce an arbitrary factor not based on the "character" or "record" of the petitioner or of the offense itself.<sup>3</sup> For it was arbitrary discretion of the jury that led the Supreme Court in Furman to conclude that death sentences were being "wantonly and freakishly" imposed. Sympathy, prejudice and other arbitrary factors could also lead to death penalties being "wanton and freakishly" imposed.

To conclude, the Petitioner did not properly preserve his constitutional issue in the trial court, Instruction 9 did not limit the consideration of the relevant mitigating circumstances in violation of Lockett, and to allow juries to consider sympathy, prejudice and other arbitrary factors would be a violation of Furman. Accordingly, this Petition for a Writ of Certiorari should be denied.

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"You are not limited in your consideration to the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine." (Emphasis added)

<sup>3</sup> See 21 O.S. 1981, § 701.13(b), which states that the Court of Criminal Appeals shall consider whether the sentence of death was imposed "under the influence of passion, prejudice or any other arbitrary factor."

III.

INSTRUCTION 9 DID NOT ALLOW THE JURY TO CONSIDER A NON-STATUTORY AGGRAVATING CIRCUMSTANCE IN DETERMINING THE PETITIONER'S SENTENCE.

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The Petitioner asserts that certiorari should be granted because jury Instruction 9, which was not objected to by the Petitioner at trial, allowed the jury to consider any non-statutory aggravating circumstance in determining life or death in violation of Graig v. Georgia, 428 U.S. 153 (1976), which required the death penalty to be imposed in a way that minimizes the risk of arbitrary and capricious action.

Instruction 9, in pertinent part provided:

"in arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider all the facts and circumstances of this case whether presented by the state or the defendant and whether presented in the first proceeding or this sentencing proceeding."

Instruction 4, which provided in pertinent part: "You may only consider those statutory aggravating circumstances set out in these instructions," when read together and in context with the other instructions such as Instruction 9 in the second stage of trial, made it clear to the jury that all the facts and the circumstances of the case could be considered by the jury in determining whether any of the listed aggravating circumstances applied to the present case. In light of the instructions, when viewed in the context of the overall charge and this Court's mandate in Lockett v. Ohio, which authorized the sentencer to consider not only the Petitioner's record and character, but any circumstances of the offense, the jury instructions did not allow the jury to consider a non-statutory aggravating circumstance. See Cupp v. Naughten, 414 U.S. 141, 146-147 (1973).

IV.

THE OKLAHOMA COURT OF CRIMINAL APPEALS PROPERLY DETERMINED THAT THE AGGRAVATING CIRCUMSTANCES THAT THE MURDER WAS COMMITTED TO AVOID ARREST OR PROSECUTION APPLIED IN THE INSTANT CASE AND SUCH A FINDING WAS A SUFFICIENT BASIS FOR THE IMPOSITION OF THE PETITIONER'S DEATH SENTENCE.

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The Petitioner contends that there was insufficient evidence to prove the aggravating circumstances that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution beyond a reasonable doubt, especially in light of the fact that the court found there was insufficient evidence that the Petitioner committed a felony by using a false and bogus credit card.

The Oklahoma Court of Criminal Appeals determined that there was sufficient evidence of this aggravating circumstance when it stated:

" . . . This argument lacks merit because of our previous decision in Eddings v. State, 616 P.2d 1159 (Okl.Cr.App. 1980), remanded for resentencing U.S. \_\_\_, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), wherein we stated that: 'It is important to realize that the focus of this aggravating circumstance is on the state of mind of the murderer . . . It is the murderer who must have the purpose of "avoiding or preventing a lawful arrest or prosecution." Eddings v. State, supra, at 1169. The evidence presented by the State in the taped telephone conversation between the appellant Clegg and Parks clearly established Parks' state of mind. Therefore the jury had ample evidence on which to find the aggravating circumstances and no error occurred.' 651 P.2d at 695. See also Chaney v. State, 612 P.2d 269 (Okl.Cr. 1981).

In Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980), the Oklahoma Court of Criminal Appeals stated:

"It is important to realize that the focus of this aggravating circumstance is on the state of mind of the murderer rather than the officer. It is the murderer who must have the purpose 'of avoiding or preventing a lawful arrest or prosecution.' Section 701.12, supra."

The facts and the circumstances of this case proved that the Petitioner's state of mind was to murder the victim for the sole purpose of avoiding arrest or prosecution. The Petitioner stated on the tape that he did not go to the Gulf Station to get money (Court I, 2). The Petitioner stated that he murdered Abdullah because he came out of the booth and looked at the Petitioner's tag

number after the Petitioner used a "hot" credit card (Court I, 2, 3). The Petitioner then stated that Abdullah would have called the law as soon as he left the station and he didn't want the law to find the guns and everything else in his trunk (Court I, 3, 12). He was afraid that before he could get very far, the law would get him. Therefore, the Petitioner figured "if he don't be around then ain't nothin' he can tell them noway." (Court I, 3).

The Petitioner, again in this taped conversation, stated, "ain't no witness, so what?" when his friend told him that what he did was murder (Court I, 5). He further stated, ". . . I'm what I'm trying to get you to see, if they, if I would have got caught red today they can't find nobody that they can get up there and say yea, they seen me do this or seen me do that or this happen or that happen because there wasn't nobody there but me and him" (Court I, 5). Further, the Petitioner had been in the penitentiary before and did not want to go back. Moreover, the evidence at the scene, evidence in the car, the findings of the guns in the location where the Petitioner stated he placed them, the fingerprints on the car, the Petitioner's flight, and the Petitioner's use of a fake name and I.D. all substantiate and corroborate the tape and substantiated the fact that the Petitioner committed this murder to avoid an arrest or prosecution, although the same circumstances did not substantiate the use of a bogus credit card.

Since this aggravating circumstance was supported beyond a reasonable doubt and such a finding is sufficient for imposition of a sentence of death,<sup>4</sup> the Petitioner's argument that the Oklahoma Court of Criminal Appeals is rubber-stamping this aggravating circumstance is without merit. Also, the Petitioner's argument that the Oklahoma Court is rubber-stamping other aggravating circumstances not pertinent to the present case is of no consequence to this case and therefore, should not be considered by this Court.

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<sup>4</sup>

See 21 O.S. 1981, § 701.12(5) and 21 O.S. 1981, § 701.11.

V.

THE OKLAHOMA COURT OF CRIMINAL APPEALS HAS NOT INTERPRETED 21 O.S. 1981, § 701.11, IN A MANNER WHICH CREATES AN UNCONSTITUTIONAL MANDATORY IMPOSITION OF THE DEATH PENALTY ONCE AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES AND THIS STATUTE DOES NOT UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE PETITIONER TO PROVE THE MITIGATING CIRCUMSTANCES.

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The Petitioner lastly asserts that the Oklahoma Court's interpretation of 21 O.S. 1981, § 701.11, in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), requires the jury to impose the death penalty once aggravating circumstances outweigh mitigating circumstances, and this mandatory imposition of the death penalty shifts the burden of proof to the Petitioner to prove he should live.

In Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), the Oklahoma Court did not interpret 21 O.S. 1981, § 701.11 to require a mandatory imposition of the death penalty,<sup>5</sup> when it stated:

"The only discretion provided the jury under the statute is that necessary to make a factual finding of the existence or non-existence of aggravating and mitigating circumstances, as well as the discretion requisite in balancing the two. . . ."

In the present case, the Oklahoma Court made the following determination:

"It is true that the Supreme Court struck down North Carolina's death penalty statute because it made the imposition of the death penalty mandatory once first-degree murder was found. On the contrary, the Oklahoma statute provides objective standards to guide the jury in its sentencing decision; the jury is not required to recommend death even if it

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<sup>5</sup> Title 21 O.S. 1981, § 701.11, provides: "In the sentencing process, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life." (Emphasis added.)

finds that one or more aggravating circumstances have been established beyond a reasonable doubt. Similar statutory schemes have been upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).<sup>6</sup> 651 P.2d at 694. (Emphasis added)

The Oklahoma Court has determined that the jury is not required to recommend death even if it finds that one or more of the aggravating circumstances have been established beyond a reasonable doubt; therefore, the Oklahoma Court did not interpret § 701.11 so as to require a mandatory finding of death when the aggravating circumstances outweigh the mitigating circumstances.

The instruction presented to the jury in this case also did not require the jury to give death if the aggravating circumstances outweighed the mitigating circumstances.<sup>6</sup> This instruction merely authorized the jury to impose death as the Petitioner's sentence if the aggravating circumstances outweigh the mitigating circumstances.

It is also noteworthy that the Petitioner at trial stated, "The defendant has read the instructions and the verdict forms, and they are acceptable to the defendant." (T.R. 659). Thus, the Defendant never presented this argument to the trial court for a determination. One cannot complain of a failure by the court to charge on an issue without calling the attention of the court to the omission by a prayer for instruction. Humes v. United States, 170 U.S. 210, 18 S.Ct. 602, 42 L.3d. 1011 (1898):

"It has long been the settled rule in Federal courts that an instruction by the court must be excepted to before the case is submitted to the jury in order to be availed of on appeal. This is no merely technical requirement, but is founded upon reason, justice and expediency. If the error is seasonably called to the court's attention, the court can correct it forthwith and thus, obviate the necessity of a new trial." (Citations omitted)

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<sup>6</sup> In the event you find unanimously that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.

If you do not find unanimously beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death, and then sentence would be imprisonment for life.

The Petitioner further asserts in his brief that the burden of proof was impermissibly shifted to him during the second stage of the proceedings.

An indication of the United States Supreme Court's position regarding the responsibility of showing mitigating factors as to punishment was stated in Lockett v. Ohio, *supra*. The Court reversed and remanded petitioner's death sentence because Ohio law limited the scope of mitigating circumstances which might be considered by the sentencing authority. Although not squarely addressing the issue of burden of showing mitigating circumstances, the Court clearly implied in dicta that it is the defendant's responsibility to show factors which might lessen punishment. The plurality held:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis added) 438 U.S. at 604.

Furthermore, the State bears the burden of proving guilt beyond a reasonable doubt and the Petitioner is not required to produce evidence or testimony in mitigation. Rather, the trial court instructs the jury to consider mitigating factors even if the Petitioner does not take the stand and does not offer specific mitigating evidence. Accordingly, this proposition is without merit and this writ should be denied because the Oklahoma Court of Criminal Appeals has not interpreted § 701.11 in a manner which creates an unconstitutional mandatory imposition of the death penalty and the burden of proving the mitigating circumstances was not impermissibly shifted to the Petitioner.

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Even if you find unanimously one or more of the aggravating circumstances existed beyond a reasonable doubt, and if you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstances, then and in such event the death penalty shall not be imposed, and the sentence would be imprisonment for life. (O.R. 35).

CONCLUSION

While this Court's Rule 17 is, by its own terms, not exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court will consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any State. Nor does the Court need to exercise its supervisory powers herein. The State court below has acted in accordance with decisions of this Court and had found that the Petitioner's rights have not been violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the Petitioner's assignments of error by both argument and citations of authority, respectfully requests this Honorable Court to deny the Petitioner's Writ of Certiorari.

Respectfully submitted,

*J.W. Eric Cartwright*  
J.W. ERIC CARTWRIGHT

ATTORNEY GENERAL OF OKLAHOMA

*Susan Talbot*  
SUSAN TALBOT

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ATTORNEYS FOR RESPONDANT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA      )  
                              )      ss.  
COUNTY OF OKLAHOMA    )

Susan Talbot, being first duly sworn, upon he oath does state:

1. That I am an Assistant Attorney General for the State of Oklahoma and one of the attorneys of record in the above-styled case representing the Respondent, State of Oklahoma.

2. That on December 15, 1982, prior to 5:00 p.m., Central Standard Time, I caused to be placed forty (40) copies of the above Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals in an envelope properly addressed to the Clerk of this Court, with postage prepaid, which was deposited in the United States Mail in Oklahoma City, Oklahoma.

3. One copy of the foregoing Petition was mailed, postage prepaid, to:

Robert A. Ravitz  
First Assistant  
Public Defender  
Oklahoma County  
409 County Office Bldg.  
320 Robert S. Kerr Ave.  
Oklahoma City, OK 73102

4. All parties required to be served have been served.

FURTHER AFFIANT SAYETH NOT.

Susan Talbot  
SUSAN TALBOT

Subscribed and sworn to before me this 15<sup>th</sup> day of December, 1982.

S. Kay Brown  
NOTARY PUBLIC

(seal)

My Commission Expires: June 30, 1986.

Kes